

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CITY OF GRASS VALLEY,)	
)	2:04-cv-00149-GEB-DAD
Plaintiff,)	
)	
v.)	<u>ORDER</u> *
)	
NEWMONT MINING CORPORATION, a)	
corporation; NEWMONT USA LIMITED,)	
a corporation; NEWMONT NORTH)	
AMERICAN EXPLORATION LIMITED, a)	
corporation; NEW VERDE MINES LLC,)	
a limited liability company;)	
NEWMONT REALTY COMPANY, a)	
corporation,)	
)	
Defendants.)	
_____)	

Defendants move to disqualify Plaintiff's outside counsel, arguing that the outside counsel's contingency fee arrangement with the City violates a government attorney's duty of neutrality. (Def.s' Mot. at 3:6-14.) Plaintiff (hereinafter sometimes referenced as "the City") opposes the motion. For the following reasons, the motion is denied.

* This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

1 Defendants argue that the California Supreme Court's
2 decision in People ex rel. Clancy v. Superior Court (Clancy), 39
3 Cal.3d 740, 750 (1985) compels disqualification of Plaintiff's outside
4 counsel because Clancy held that a government entity could not hire
5 outside counsel on a contingency fee basis to litigate claims for
6 abatement of a public nuisance. (Def.s' Mot. at 3:19-24.) The City
7 includes in its Complaint, *inter alia*, a claim for abatement of public
8 nuisance. (Pl.'s Compl. at 10:16-12:6.) Defendants assert that the
9 City's lead trial counsel is being compensated on a contingency fee
10 basis. (Def.s' Mot. at 2:7-16.) The City counters that it is
11 authorized by California Government Code section 37101 to hire outside
12 counsel and that Clancy approves of hiring outside counsel where the
13 government retains control of the litigation. (Pl.'s Opp. at 2:6-12,
14 n.1.)

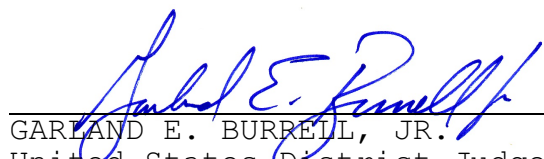
15 Courts have the inherent power to disqualify counsel.
16 Cargill Inc. v. Budine, 2007 WL 1813762, *7 (E.D. Cal. June 22, 2007).
17 Motions to disqualify counsel are decided based on state law. In re
18 County of Los Angeles, 223 F.3d 990, 995 (9th Cir. 2000). The party
19 seeking disqualification bears the burden of proving the conflict
20 alleged. United States v. Schafer, 2006 WL 3271290, *7 (E.D. Cal.
21 Nov. 12, 2006).

22 Even assuming arguendo that the City's outside counsel is
23 hired on a contingency fee basis, Defendants have not countered
24 Plaintiff's showing that the City Attorney for the City of Grass
25 Valley is acting as co-counsel in this action and the City retains
26 "ultimate decision-making authority in the case." (Decl. of Jeffrey
27 Folz in Opp. ¶ 4; Pl.'s Opp. at 6:12-20.) Accordingly, Defendants'
28 motion is denied. Clancy, 39 Cal.3d at n.3 (distinguishing Sedelbauer

1 v. State, 455 N.E.2d 1159, 1164 (Ind. App. 1983) because in that case
2 "the court approved the assistance of a private attorney only because
3 he appeared 'not in place of the state's duly authorized counsel.'";
4 City and County of San Francisco v. Philip Morris, Inc., 957 F.Supp.
5 1130, 1135 (N.D. Cal. 1997) ("the Court finds that this case is
6 sufficiently distinguishable from Clancy [because outside counsel] is
7 acting here as co-counsel, with plaintiffs' respective government
8 attorneys retaining full control over the course of the litigation.").

9
10 IT IS SO ORDERED.

11 Dated: November 19, 2007

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14 GARLAND E. BURRELL, JR.
United States District Judge
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